Office-Supreme Court, U.S.
FILED
JAN 10 1950
JAMES P. BROWNING, Clerk

IN THE

Supreme Court of the United States

No. 238

SAMUEL KOWALSKY,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Petitioner respectfully asks for a Writ of Certiorari to the Court of Appeals for the Fifth Circuit to review a judgment of that Court affirming a conviction for income tax evasion in the District Court for the Southern District of Texas, Laredo Division.

OPINION

The Opinion of the Court of Appeals was filed on May 17, 1961, and is not yet officially reported, but appears in Appendix A.

JURISDICTION

The Judgment of affirmance was dated and entered May 17, 1961 (Appendix B). Petition for Rehearing was duly filed within the 21-day period allowed therefor by Rule 29 of the Rules of the Court of Appeals for the Fifth Circuit. Such Petition for Rehearing was denied by order dated and entered June 22, 1961 (Appendix C).

Jurisdiction of the Court to review is granted by Section 1254(1) of Title 28, U.S.C. and Rule 37(c) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that venue was properly laid in the District of Petitioner's residence in the Southern District of Texas where the income tax returns were filed in another district and the only act alleged to have been committed in the Southern District was the preparation of the returns?

2. Did the Court of Appeals err in holding that the conduct of the trial judge during the course of the trial was not of such a nature as to destroy his position as an impartial arbitrator and to make apparent his advocacy in the Government's behalf

and his own conviction of Petitioner's guilt, thereby denying Petitioner a fair trial and due process of law?

3. Did the Court of Appeals err in holding that the motion for judgment of acquittal should not have been granted where the Government's case failed to show whether the Petitioner was on the cash, the accrual, or some other method of reporting income?

Constitutional Provisions And Statutes Involved

The Constitutional provisions and statutes involved are set out in Appendix D.

Statement Of Case

1. General Facts

Petitioner was charged by indictment in three counts with willfully and knowingly attempting to evade and defeat a large part of his and his wife's income tax for the calendar years 1954, 1955 and 1956 (R. 5-8). On trial before a jury Petitioner was convicted on count two and count three and acquitted on count one. The Trial Court imposed a sentence of three (3) years imprisonment and a fine of Three Thousand and No/100 Dollars ($3,000.00) on counts two and three, jointly (R. 1381-1382). The judgment was affirmed by the United States Court of Appeals for the Fifth Circuit on May 17, 1961 (Appendix A), and rehearing was denied by order of the Court (Appendix C).

2. Venue

Petitioner resides in Laredo, Texas (R. 924). Each count of the indictment charged that he willfully attempted to evade and defeat income taxes owed by him and his wife for the years 1954, 1955 and 1956 by preparing and causing to be prepared at Laredo, Texas, (which is in the Southern Judicial District of Texas) and filing and causing to be filed with the District Director of Internal Revenue at Austin, Texas, (which is in the Western Judicial District of Texas) a false and fraudulent income tax return which understated the taxable income and the tax due thereon by substantial amounts for each of the years. Petitioner timely filed a motion to dismiss the indictment and with leave of Court amended his motion to dismiss (R. 9). Petitioner's amended motion to dismiss was overruled by the Trial Court (R 15).

3. Denial of Fair and Impartial Trial Issue

(A) Interrogation by the Trial Court of Petitioner's Fact Witness:

During the course of the trial Petitioner called six witnesses, four of whom testified in regard to Petitioner's reputation in the community for honesty and fair dealing and for truth and veracity (R 1,033, 1104, 1106, 1107), and one of whom testified as to the reason certain checks were given to Petitioner (R. 1237). Petitioner's wife, the only other witness called by the Petitioner, was the principal defense witness. On direct examination (R. 997,

1033, 1035, 1078) the Petitioner's wife testified in regard to pertinent facts regarding the preparation of her work papers and the tax returns; the reason she and Petitioner established saving accounts, the reason the saving accounts were opened in San Antonio, Texas, banks; the procedure that was followed in making deposits to such accounts and the reason such deposits were omitted from her work papers and the tax returns. Petitioner's wife was cross-examined extensivley by Government counsel (R 1078-1103, 1109-1215). After re-direct examination by Petitioner's councel (R. 1215-1229) Petitioner's wife was interrogated vigorously and incisively by the Trial Judge (Appendix A, CA Op.) By the way of illustration the following questions are typical of the court's examination:

> Q. (By the Court) You have told us *you just forgot it*, Mrs. Kowalsky? (R. 1229) (Emphasis added).
>
> Q. And you kept these money orders *hidden at home in a closet*, and prepared the deposit slips from time to time, and gave the money orders to Mr. Kowalsky to deposit when he was going to San Antonio? (R. 1230) (Emphasis added).
>
> Q. And for three years, and with a great many thousand dollars involved, *you are telling me you just forgot it?* (R. 1231) (Emphasis added).

The witness had at no time testified that the money orders were "hidden" in a closet.

Upon completion of the Court's interrogation of Petitioner's wife, Petitioner's counsel requested the Court to instruct the jury that it should not be influenced by the Court's interrogation of the witness

and that all of the Court's interrogation be stricken from the record, as it was prejudicial to the Petitioner (R. 1235). The Court refused to give the jury such special instruction at the time and denied the motion to strike the Court's interrogation of the witness (R. 1235, 1236).

(B) Requiring Jury to Deliberate Further After Being Advised It Was Hopelessly Deadlocked

At 3:00 o'clock p.m. on May 25, 1960, the jury retired to consider its verdict (R. 1312). The jury continued its deliberations until 6:30 o'clock p.m., at which time it was dismissed until 9:30 o'clock a.m. May 26, 1960 (R. 1316). At 11:00 o'clock a.m. on May 26, 1960, the jury returned to the jury box (R. 1316) and immediately thereafter the forelady of the jury informed the Court that the jury was hopelessly deadlocked and that it would be unable to reach a unanimous decision (R. 1317). Notwithstanding, the Court required the jury, over the objection of Petitioner's counsel (Supp. R. 1318-A. 1318-B) to return to the jury room for further deliberation (Supp. R. 1316). Subsequently, the jury returned its verdict, finding Petitioner not guilty on count one and guilty on counts two and three (R. 1319).

4. Government's Failure to Prove Whether Petitioner on Cash, Accrual or Some Other Method of Accounting

The Government, in response to the Trial Court's order to furnish Petitioner with a bill of particulars, advised Petitioner, prior to trial, that it would pur-

sue the "specific items method" of making proof of unreported income; that the unreported income for the calendar years 1954, 1955 and 1956 was $2,515.37, $6,681.95 and $8,446.99, respectively; and that such unreported income consisted of accounting fees and interest income. During the trial of the case the Government failed to offer any evidence as to whether the Petitioner was on the cash, accrual or some other basis of reporting income. At the conclusion of all the evidence, this point was specifically called to the attention of the Court in a motion for judgment of acquittal (R. 1369), which was overruled.

ARGUMENT

Introduction To Argument

This is a most unusual case. Each of the three questions presents an issue of law of paramount importance to the jurisprudence of this country. Further, not one of such questions has heretofore been passed upon by this Court.

The venue question affects the entitlement of defendants to be tried in the district where a crime is alleged to have been committed. It involves a construction of Rule 18, F.R.Cr.P., 18 U.S.C., and Section 3237(a), 18 U.S.C., as applied to the crime of attempted income tax evasion.

The second question involves the application of the Fifth and Sixth Amendments of the Constitution to the conduct of the trial judge in criminal cases.

The third question involves the necessity of the prosecution to show the method of reporting income employed by defendants in "specific items" cases.

The answers to these questions are important not only to this Petitioner but to a multitude of parties similarly situated. It is not often that this Court is afforded the opportunity to set at rest so many questions of such varied application.

THE COURT OF APPEALS ERRED IN HOLDING THAT VENUE WAS PROPER IN THE SOUTHERN DISTRICT OF TEXAS

1. Reasons for Granting Writ

A major constitutional question is presented by the holding of the Court of Appeals. In holding that where preparation of a tax return is charged in one district and filing in another district, venue is proper in either district (Appendix A, CA Op.), the Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court. The question involved here is not one of procedure but one that involves substantive rights, *Travis v. United States*, 364 U.S. 631.

The Court of Appeals' decision is confusing, ambiguous and erroneous. The opinion asserts that decisions of that Court in *Holbrook v. United States* (5th Cir.) 216 F. 2d 238, and *Reynolds v. United States* (5th Cir.) 225 F. 2d 123, held that where preparation is charged in one district and filing in another, venue would be in either. These cases sim-

ply do not so hold. In *Holbrook*, supra, the indictment alleged a willful attempt to defeat income taxes by filing a false return; in *Reynolds*, supra, no returns were in fact prepared or filed. In truth and in fact no case ever decided prior to this one has ever held that preparation alone within a district is sufficient to fix venue within that district. To hold that *Holbrook*, supra, and *Reynolds*, supra, cases "are controlling here" (Appendix A, CA Op.) is to ascribe to them a fact situation which plainly did not exist in either and a conclusion which they did not remotely contain.

To sustain venue in the district of preparation, it was necessary for the Court of Appeals to hold that either Rule 18, F.R.Cr.P., 18 U.S.C., or Section 3237(a), 18 U.S.C., was applicable. From the Court of Appeals' decision it cannot be ascertained which was relied on, as no mention is made of either.

In order to clarify this very important Constitutional question this application should be granted, and for the reasons hereinafter set forth the Court of Appeals' decision should be reversed.

2. Venue in Southern Judicial District of Texas Improper

A. No act committed in the Southern District was sufficient to confer venue under Rule 18, F.R.Cr.R., 18 U.S.C.

In those cases where a crime of attempted tax evasion consists of several acts alleged to have been

committed in two districts, *each of which is a completed attempt*, venue is proper in either district under Rule 18, F.R.C. P., 18 U.S.C. The indictment here, however, alleges *preparation* alone in the Southern District of Texas.

This Court's decision in *Spies v. United States*, 317 U.S. 492, makes it clear that the felony of attempted tax evasion must be committed by an *affirmative act* AND that such act must "not consist of conduct that would culminate in a more serious crime but for some impossibility of completion or interruption or frustration" (Emphasis added). In this sense it is not akin to attempted murder, rape or arson. Indeed, this Court said, in the *Spies* case, that it is "an independent crime", complete only "when the attempt is complete".

Thus, when the return in this case was prepared, no attempted evasion had occurred. What if Petitioner had placed the return in his desk drawer and, prior to the date the return would have been due, an Internal Revenue agent found it during an investigation? With these facts and nothing more, would Petiitoner be guilty of the felony of attempted evasion? Of course not. This is the fundamental rule of the *Spies* case.

So, it is obvious that the prosecution could not be maintained in the Southern District of Texas under the general venue provisions of Rule 18, F.R.Cr.P., 18 U.S.C., as the preparation of the returns did not constitute a completed attempt.

B. Under Section 3237(a), 18 U.S.C., mailing is the sine qua non in attempted tax evasion cases in the absence of an act constituting an attempted evasion per se.

In the Government Brief filed with the Court of Appeals, the Government clearly recognized that the prosecution could not be maintained in the Southern District of Texas under the general venue provisions of Rule 18, for it found it necessary to rely on the extraordinary venue provisions of Section 3237(a) (Gov't. Br. p. 7). In its futile attempt to bring this case within the purview of that Section it quoted *only* the first paragraph of subdivision (a) of the statute permitting the prosecution "in any district in which such offense was begun, continued or completed" (Gov't. Br. p. 7). Significantly the remaining paragraph of that same subdivision (a) was omitted from the Government Brief. It reads:

> "Any offense involving the use of the mails, or transportation of interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any such district from, through or into which such mail matter moved."

Petitioner asserts that the provisions of subdivision (a) must be read in *pari materia*. To do otherwise would be to violate well established rules of statutory construction. Unless the actual commission of the crime in a particular district confers venue under Rule 18, then mailing must be alleged

to sustain venue there; otherwise the offense is not within the ambit of Section 3237(a). Mailing, and mailing alone, makes of the crime a "continuing offense".[1]

C. If mailing is not an essential element of venue under Section 3237(a), 18 U.S.C., then alternatively, the Government limited itself to a single act of evasion, namely "filing a false and fraudulent return".

The Government elected in this case to prosecute in the Southern District. Residence alone did not confer venue sufficient to maintain proceedings there. Constitution of the United States, Art. III, Sec. 2, Clause 2; and Amendment VI.

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[1] Petitioner submits that he is not alone in this interpretation. In 1958, when Congress was considering the addition of Section 3237(b), 18 U.S.C., to confer on defendants in attempted evasion and false filing cases the privilege of removal of such prosecution to their home district, it is manifest that the committee and the Department of Justice alike (and ultimately the Congress itself) considered mailing as the essential element. See Senate Report No. 1952, US Code, Congressional and Administrative News, 85th Cong. 2nd Session, p. 3261. Subdivision (b) is confined to cases wherein the offense involved the "use of the mails". That is the precise and opening limitation on the option.

In enacting Section 3237(b), Congress was striving to give defendant the option to be tried in the district of his residence in criminal income tax cases wherein venue was conferred elsewhere under Section 3237(a). It is submitted that Congress succeeded in doing just that. The only cases left where the defendant can be tried out of his home district are those wherein the act is "committed" in another district, and those cases fall within the general venue provisions of Rule 18.

The indictment here charged attempted evasion on two counts alone, namely, (1) preparation of return in the Southern District and (2) filing the return in the Western District. On the basis of the authorities cited earlier, it is clear that preparation alone is not sufficient. Thus venue is sustainable in the Southern District *if, and only if,* (1) preparation is a "distinct part" of filing or (2) the act of filing was a continuously moving act commencing with preparation and ending with delivery. This Court has held that multiple venue requires one or the other. *Travis v. United States*, 364 U. S. 631.

"Filing" for the purposes of venue must be construed in its ordinary sense. It connotes delivery and receipt, *United States v. Lombardo*, 241 U.S. 73. See also *Travis v. United States*, supra; *Valenti v. United States*, (3rd Cir.), 207 F. 2d 242. Therefore, "preparation" cannot and does not constitute a "distinct part" of "filing". Indeed, under the *Lombardo* case, it constitutes no part at all.

If venue is to be sustained in the Southern District it would have to be on the basis that the act of filing was a continuous moving act begun with preparation and ending with delivery. The Government made a similar contention in the *Lombardo* case, saying "with few exceptions every crime has continuity". However, this Court answered:

> "But the law, being essentially practical, does not regard every crime as continuous for the purpose of jurisdiction." *United States v. Lombardo*, 241 U.S. 73.

The law does not permit the Government to cast about for grounds of venue on the basis of some supposed continuity of conduct and to fix venue merely by virtue of some theory not explicitly contemplated by Congress. Indeed, this Court very recently said in the *Travis* case, supra:

> "We are also aware that venue provisions in acts of Congress should not be so freely construed as to give Government the choice of 'a tribunal favorable' to it."

The Government made its allegations and must abide by those allegations to support venue. There is no venue fact alleged which sustains venue in the Southern District of Texas.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE CONDUCT OF THE TRIAL JUDGE DID NOT DENY PETITIONER A FAIR TRIAL AND DUE PROCESS

1. Reasons for Granting the Writ

The decision of the Court of Appeals on this point should be reviewed by this Court for two reasons:

A. So far as Petitioner can discern, this Court has never written on the precise question here involved; and,

B. The decision here conflicts not only with decisions of other Circuits (see *Frantz v. United States* (6th Cir.) 62 F.2d 737, *Williams v. United States* (9th Cir.) 93 F.2d 685, and *United States v. Carmel* (7th Cir.) 267 F.2d

345) but with its own decisions (see *Adler v. United States* (5th Cir.) 182 F.2d 464, *Hunter v. United States* (5th Cir.) 62 F.2d 217 and *Blumberg v. United States* (5th Cir.) 222 F.2d 496).

2. Conduct of Trial Judge Violated Petitioner's Constitutional Rights

The Court of Appeals for the Fifth Circuit heretofore has announced the universally accepted standard applicable in these cases in the following language:

> ". . . While that method of cross-examination if it had been conducted by the district attorney, might have been proper, a district judge ought never to assume the role of a prosecuting attorney and lend the weight of his great influence to the side of the government. It is the judge's duty to maintain an attitude of unswerving impartiality between the government and the accused, and he ought never in any questions he asks go beyond the point of seeing to it, in the interest of justice, that the case is fairly tried. We refer with entire approval to what Judge Shelby, speaking for this court long ago, said on this subject in *Adler v. United States* 182 F. 464. The only conclusion that could reasonably be drawn from the questions objected to was that the judge did not believe appellant was telling the truth about the amount or source of his income, . . . It is vastly more important that the attitude of the trial judge should be impartial than that any particular defendant, however guilty he may be, should be convicted. It is too much to expect of human nature that

> a judge can actively and vigorously aid in the prosecution and at the same time appear to the laymen on the jury to be impartial." *Hunter v. United States* (5th Cir.) 62 F.2d 217.

That doctrine has consistently been pronounced from the early case of *Adler v. United States* (5th Cir.) 184 F. 464, through the relatively recent opinion in *Papalia v. United States* (5th Cir.) 243 F.2d 437.

The opinion of the Court of Appeals in the case at bar, however, while finding that the interrogation of the witness, Mrs. Kowalsky, was "vigorous and incisive," nonetheless held that it did not convey "personal prejudice or hostility, or a conviction of . . . falsity." While admitting that the settled law prohibits the examination of a witness "in such a way as to convey to the jury any impression or feeling that the witness is unworthy of belief", the Court of Appeals held that the examination here conducted does not violate those settled principles.

Apparently both the Trial Court and the Court of Appeals proceeded on the theory that an invasion of Constitutional rights is permissible if it encompasses only a small part of the record. True, only one defense witness was so examined, but she was the only defense witness who testified as to the reasons why the items of income were not reported. She was accepting the blame. Rightly or wrongly, properly or improperly, justifiably or unjustifiably, she was asserting that she was responsible for the failure. Her testimony was not a

part of the defense. It *was* the defense. Believe it and Petitioner is acquitted; disbelieve it and he is convicted. In this situation, after she had been examined, cross-examined and examined again, the Trial Judge interceded in the manner of a prosecuting cross-examiner, asking the witness questions such as,

> "And for three years, and with a great many thousand dollars involved, *you are telling me that you just forgot it?*" (Emphasis added).

It is difficult, indeed impossible, to equate this language in this and other questions of the Court in a similar vein with holding of the Court of Appeals that the interrogation conveyed no "personal prejudice or hostility or a conviction of its falsity."

The opinion makes no explanation as to why the interrogation did not convey prejudice, hostility or a conviction of falsity.

There seems to be a growing tendency on the part of judges to recite these rules as though they were mere platitudes and yet in their specific application to sweep aside infringements of Constitutional safeguards with mere conclusions and a broad wave of the hand.

Petitioner is not unaware of the complexity of the problem involved in laying down inflexible and all encompassing rules. Yet, surely, if Constitutional safeguards are being de facto denied (as Petitioner says they are, have been and were here denied), there could be no more propitious time

for this Court to enter the field; to enter it and speak out with words of admonition of clear and unmistakeable quality; to enter it and make manifest that encroachments should not and must not be tolerated where Constitutional rights are involved.

A careful reading of the opinion of the Court of Appeals leads to the inevitable conclusion that such Court entertained some misgivings as to the sufficiency of its holding that Petitioner had not been denied a fair trial. The affirmance was grounded in part on the fact that the jury was instructed "not to be influenced by any opinion they might think the judge had." This was apparently supposed to have corrected the situation because (1) the jury was instructed not to construe the questioning of a witness by the court as indicating the Court's feeling of guilt or innocence of the accused or credibility of any witness; and (2) Petitioner took no exception to such instruction nor "was any request made for an instruction."

As to this latter point, Petitioner had timely raised the question by requesting a special instruction at the very time and by making a motion to strike the Court's interrogation. Furthermore, the only more specific instruction which would have been given in the charge would have to have been couched in such language as to reiterate and underscore the Trial Judge's doubt as to the credibility of the main defense witness.

But the idea [illegible] misconduct such as occurred here can be swept under the rug by an instruction

that the jury is the sole judge of the credibility of witnesses is such a departure from Constitutional safeguards of fair trial and due process as to be shocking indeed. This Court has often spoken out against the idea that Constitution safeguards can be lightly treated, as, for example, in *Kotcakos v. United States* 328 U.S. 750, 773, where it was said:

> "But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when the fashion has become rampant over the earth."

Interestingly enough, the Court of Appeals cites no authority for its holding that an instruction can wipe out the entire error. Such authority was available in two opinions of the Third Circuit, *United States v. Stayback* (3rd Cir.) 212 F2d 313, cert. den. 348 U.S. 911 and *United States v. Rutkin* (3rd Cir.) 189 F2d 431, aff. 343 U.S. 130.

The rule in *Stayback*, supra, and *Rutkin*, supra, is a dangerous trend. It sets in motion thought processes which represent a threat to the position of a judge as an impartial arbiter in a criminal trial. The Government brief in the Court of Appeals in this case at pages 23-28 makes the bald assertion that the Trial Judge could have said "I do not believe this witness" and that so long as the jury was instructed that fact finding was its exclusive province, no reversible error would exist.

3. Need for Pronouncement of Rules Governing Conduct of Trial Judges.

If Constitutional safeguards of Fair Trial and Due Process are to be preserved, it is imperative that this Court carefully delineate the rules governing conduct of Trial Judges. These Constitutional rights are in danger of being frittered away if, in criminal trials, Trial Judges are permitted to examine defendants' witnesses in a hostile manner. And the idea that all of the harm can be eliminated by a charge makes the entire matter the more reprehensible and wrong. The need for a clear and specific pronouncement of this Court could not be greater.

The Court of Appeals Erred in Holding that the Motion for Judgment of Acquittal was Properly Denied.

1. Reasons for Granting of Writ.

The Court of Appeals' holding that in this case of attempted tax evasion it was not necessary for the Government to establish whether Petitioner was on the cash, accrual or some other basis of reporting income in order to make out its case is in conflict with this Court's decision in *Holland v. United States*, 348 U.S. 128. Accordingly, this application should be granted and for the reasons set out below the Court of Appeals' decision should be reversed.

2. Government Required to Prove Method of Reporting Income in Attempted Tax Evasion Case.

In a criminal prosecution for income tax evasion for a particular tax year, it is necessary for the Government to *allege* and *prove* the amount of tax that was evaded in such taxable year. *United States v. Sullivan*, (2nd Cir.) 98 F. 2d 79; *United States v. Johnson*, (7th Cir.) 123 F. 2d 111. Hence, in a "specific items" case such as Petitioner's, the Government is required to establish beyond a reasonable doubt that (A) the specific items of alleged income were properly includable in income and (B) such items should have been reported in income in the year alleged. In order to do so it is incumbent upon the Government to establish the method of accounting which is employed in keeping books and computing income as this element determines the year in which an item is required to be included in income.[2]

An examination of the complete record in this case fails to reflect any evidence, and this fact was

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[2] 26 U.S.C. §446(a), Internal Revenue Code of 1954, provides that taxable income may be computed under the cash receipts method, the accrual method, or any other methods prescribed under the regulations prescribed by the Secretary of his delegate (Appendix D).

26 U.S.C. §451(a), Internal Revenue Code of 1954, provides that an item of income is required to be included in gross income in the taxable year in which received, unless, under the method of accounting employed by the taxpayer such amount is properly accountable in a different period. (Appendix D).

not disputed by the Court of Appeals, as to which method of acounting was utilized by the Petitioner in keeping his books and computing his income. Thus, the evidence was fatally deficient in that it failed to show that the items of unreported income were required to be reported by Petitioner in the years alleged in the indictment. As a consequence, the Government failed to sustain its burden of proof.

In substance, all the Government proved in this case was that Petitioner received the specified items of unreported income. This will not suffice to support a conviction for criminal income tax evasion under the reasoning of this Court in *Holland v. United States*, 348 U. S. 128. It was there stated:

> "The statute defines the offense here involved by individual years. . . . While a steadily increasing net worth may justify an inference of additional earnings, unless that increase can be reasonably allocated to the appropriate tax year, the taxpayer may be convicted on counts of which he is innocent."

The Court of Appeals erroneously attempted to limit the principles of tax accounting previously described and the reasoning of this Court in the *Holland* decision, supra, to net worth cases. Petitioner submits that there is no logical basis to do so. Merely because the Government establishes that an item is income does not establish that a taxpayer was required to include it in taxable income in the year alleged.

This is a criminal prosecution. It is not susceptible to the loose application of rules which might, in a civil tax proceeding, place on the Petitioner the burden of establishing what his method of accounting was. Petitioner cannot be found guilty on presumption or assumption. His conviction can be upheld only by evidence establishing *beyond a reasonable doubt* that the items of income were received *and* that they were properly reportable on the return which was filed.

CONCLUSION

The Writ of Certiorari should be granted in this case. The venue question alone, involving, as it does, substantive rights (See *Travis v. United States*, 364 U.S. 631) justifies and merits the attention of this Court.

Petitioner is well aware of the fact that writs can not be granted in all cases involving denial of the Constitutional right to a fair trial. In many of these, as here, fact questions are presented. Yet the mere recitation of proper rules gives little protection to defendants in criminal cases when their precise application permits them to be disregarded de facto. Mere conclusions that they have been preserved does not suffice when a careful scrutiny of the record discloses otherwise. There is a great and abiding need for this Court to speak with a clarity which will not be misunderstood in laying down rules for the guidance of trial and intermediate appellate courts.

Likewise, the applicability of the rules of the *Holland* case, 348 U.S. 128, to "specific items" cases should be clearly pronounced. It would seem to be fundamental that the Government has the burden in all cases of alleged income tax evasion to show not only that the income was unreported but that it was reportable during the prosecution period. Otherwise, there is cast on the defendant the burden of rebutting that which the Government failed to prove. Yet the Court of Appeals opinion holds that the *Holland* decision has no application here. This would appear to be in direct controvention of the language of this Court which placed no limitation on the application of such rules. There is a genuine need for a specific statement by this Court on the point.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be granted and that the judgment below be reversed and Petitioner be granted a judgment of acquittal, or, alternatively, Petitioner be granted a new trial.

Respectfully submitted,

BEN F. FOSTER
RALPH G. LANGLEY
and
GORDON G. HAWN

Counsel for Petitioner

Office and Post Office Address
506 South Texas Building
San Antonio, Texas

Counsel for Respondent:

SOLICITOR GENERAL
Department of Justice
Washington 25, D. C.

MR. WILLIAM B. BUTLER
United States Attorney
Post Office Building
Houston, Texas

I hereby certify that I have delivered a copy of the above Application for Writ of Certiorari to counsel named above by depositing in the United States Mail, with first class postage prepaid, to the Post Office address indicated in each instance.

BEN F. FOSTER

APPPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18447

SAMUEL KOWALSKY,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(May 17, 1961.)

Before TUTTLE, Chief Judge, and HUTCHESON and JONES, Circuit Judges.

HUTCHESON, Circuit Judge: Defendant-appellant was tried on an indictment charging him in three counts with willfully and knowingly attempting to evade and defeat a large part of his and his wife's income tax for the calendar years 1954,

1955 and 1956. He was convicted on Count Two and Count Three and acquitted on Count One.

Here he attacks the conviction and seeks a reversal on three formal specifications of error.[1] (1) that venue was not properly laid in the district of appellant's residence in the Southern District of

[1] These specifically are:

(1) The trial court erred in overruling appellant's Amended Motion to Dismiss the Indictment, such motion being predicated on the ground that venue was not proper in the Southern District of Texas inasmuch as the indictment alleged as the only act committed in such District the preparation of the return.

(2) The conduct of the trial judge during the course of the trial was of such nature as to destroy his position as an impartial arbitrator and to make apparent his advocacy in the Government's behalf and his own conviction of appellant's guilt to that appellant was denied a fair and impartial trial. In this connection, the following acts are assigned as error, severally and cumulatively:

(a) By vocal inflections, manner and context or his questions, the trial judge, in his own cross-examination of appellant's wife and principal witness, reflected his personal conviction of appellant's guilt, assumed the position of a prosecutor, and abandoned his role of impartiality; and

(b) Permitting the Government, on several occasions to obtain recesses, both during the day and before normal closing time, in the afternoon, thereby assisting the prosecution of the case; and summarily denying equality of treatment of appellant in this regard, notwithstanding the fact that the attention of the court was called to such disparity; and

(c) Permitting Government counsel, following the introduction of exhibits and at the time of handing same to the jurors for examination, to comment thereon and to call attention of the jury to certain aspects thereof, overruling, on each such occasion, the objections of appellant's counsel to such untimely argument and testi-

Texas, since the return was filed in another district, and the only act alleged in the indictment to have been committed in the Southern District was the preparation of the return; (2) that the conduct of the trial judge during the course of the trial was of such a nature as to abandon his position as a disinterested judge and place him in the position, and give him the appearance of, an advocate in the goverment's behalf, and to make his own conviction of appellant's guilt so manifest to the jury as to deprive the appellant of a fair trial; and (3) that, since the Government's case failed to show whether appellant was on the cash, the accrual, or some other method of accounting, the motion for judgment of acquittal should have been granted.

Both appellant and appellee argue the first question vigorously and cite many cases on venue. Among the cases cited by the government in sup-

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mony by Government attorneys, thereby creating in the mind of the jury the impression that such conduct was proper and that appellant's counsel was merely obstructing the trial in objecting thereto; and

(d) By unreasonably requiring the jury to continue with its deliberations after the court had been advised by the jurors that the jury was hopelessly deadlocked, thus, in effect, requiring the minority of the jurors to surrender to the majority, not that justice be done and on the basis of a personal conviction of appellant's guilt, but in order to terminate their service as jurors.

(3) The error of the trial court in denying appellant's Motion for Judgment of Acquittal on the ground of the Government's failure to prove whether appellant was on the cash or accrual basis or some other basis of reporting income, the Government's evidence being fatally deficient in failing to show that the items of alleged unreported income were actually required to be reported during the year in question.

port of its view that venue was properly laid in the Southern District of Texas, under the allegations of the indictment, are our cases of *Holbrook v. United States*, 216 F(2) 238, and *Reynolds v. United States*, 225 F.(2) 123. In these cases we held that where, as here, the indictment charged the fraudulent preparation in one district and the filing of the return in another, venue would lie in either district. These cases, we think, are controlling here. In addition to our cases, there are cases from other circuits holding substantially to the same effect, *Beaty v. United States District Court*, 209 F(2) 575. Cf. *United States v. Albanese*, 224 F(2) 879, and *Henslee v. United States*, 262 F(2) 750 (5 Cir.).

Appellant's second specification, its attack upon the conduct of the trial judge, while in principle sound if the conduct of the judge is shown to be inimical and partisan, requires in its support a clear showing, which is not made here, that the conduct was such as to carry prejudice with it. This court has many times stated and applied the principles governing here. In each case we have recognized that there must be something more to justify a retrial than a mere suspicion or feeling that prejudice may have resulted from this source. It must appear plain and clear. Applying the rule to the facts in this case, we are of the opinion that the appellant has failed to point to facts, utterances, and occurences which support his claim with sufficient clarity to justify his conclusion that the conduct and action complained of were such as to show to the jury that the judge was to an extent an advocate for the government, that his conduct and actions

were such as to convey to the jury that he thought the defendant was guilty, and to influence the jury in that direction.

We cannot find in the record any sound basis for holding that what the judge did and said exhibited partisanship or that the defendant did not receive at his hands a full, fair, and impartial trial. No exception was taken or errors assigned to the ruling of the judge in the admisison of evidence or to his charge, indeed the charge was full and fair and protected all of the defendant's rights. He particularly instructed the jury *that they were not to be influenced by any opinion they might think the judge had*, and he expressly declined to exercise his right to comment upon the evidence. In no way did he give his opinion as to what he thought about the evidence, as to which witnesses he thought were credible and worthy of belief. In particular he instructed the jury:

> "I instruct you now that if from anything I say to you in the course of my charge you draw some inference or conclusion as to my own feeling about the matter, about the evidence of guilt or innocence of the defendant. it is not intended on my part to tell you or direct you as to what your verdict should be. *The finding of facts is your exclusive province.*" (emphasis added)

He also instructed the jury *that the questioning of a witness by the court should not be construed as indicating to the jury the court's feeling as to the guilt or innocence of the accused or the credibility of any witness.* Finally, he said:

> "If, despite these instructions, you draw some conclusion or inference or feeling about these matters, I instruct you that it should not influence you in the slightest as to the innocense or guilt of the defendant."

No exception was taken to this part of the charge, nor was any more specific request made for an instruction as to the matter here complained of.

Appellant's main point against the judge is his examination of Mrs. Kowalsky, the wife of the appellant. While it is well settled that a judge has the right to examine a witness, it is equally well settled that he should not, in doing so, do it in a way as to seek to convey to the jury any impression or feeling that he thinks the witness is unworthy of belief. We do not think that the examination of Mrs. Kowalsky, while vigorous and incisive, can be said to have been more than that, or to have conveyed personal prejudice or hostility, or a conviction of its falsity.

In addition to the complaint as to the cross-examination of Mrs. Kowalsky, appellant puts forward as evidence of unfair and partisan conduct the action of the court in permitting the government on several occasions to obtain recesses both during the day and before normal closing time in the afternoon and, thereby, assisting the prosecution of the case and denying equality of treatment to appellant in this regard, notwithstanding the fact that the attention of the court was called to such disparity. As to this matter, we think a careful reading of the record as to what was said and

done by the court in connection with appellant's request refutes the claim.

Another point put forward in suport of appellant's claim is the fact that the court, having been advised by the jurors that the jury was hopelessly deadlocked, unreasonably required the jury to continue with its deliberation, thus in effect requiring the minority of the jurors to surrender to the majority, not that justice be done on the basis of a personal conviction of appellant's guilt, but in order to terminate their service as jurors. The record[2] on this matter, in our opinion, does not support this

[2] The record shows merely that the court, when advised that the jury was deadlocked, said to them: "I would prefer that you all have a further look at the matter. Each juror, of course, has his or her own opinion, but I think it would be well if each of you would re-examine your views in the light of the argument advanced by those who do not share them. I am going to ask you, please, to return and give the matter further careful thought. After a while, later in the day, if you tell me you are unable to reach a verdict, I shall excuse you and declare a mistrial. Thank you."

Whreupon the jurors withdrew to the jury room for further deliberations. Thereafter at 3:10 P. M. of the same day the jury returned to the court room, and the following proceedings were had:

THE COURT: "Be seated, please."

"Mrs. Plumb, I take it that you all have not made any progress in trying to arrive at a verdict since you were in this morning?"

MRS. PLUMB: "May I say something? We have not arrived at a unanimous decision, but please let us go back for a few minutes more."

THE COURT: "I will be glad to let you go back, and I hope that you are able to arrive at a unanimous verdict."

and a short time thereafter the verdict was returned.

contention. The action taken and the instructions given were in accord with authority and established practice.

Of his third specification, that the evidence failed to prove whether appellant reported his income on the cash, the accrual, or some other basis, and, therefore, no case was made out against him, we agree with the government's position that the cases cited by appellant on this point are all cases where the government had used the net worth method of proof and not cases, like this one, where the government undertook to, and did, prove its case by making proof of specific omissions of income, which had been clearly proven. Under the facts and circumstances of this case, where specific omissions were shown, it was not necessary, in order for the government to make a case, to show the basis on which defendant kept his books and made his returns or any more clearly than it did the omission to report specific income. It was sufficient to make out a case of income tax evasion here to show, by the evidence, as was done, that defendant had income in the years in question which he, with intent to evade payment, failed to report.

No showing of reversible error is made. The judgment is AFFIRMED.

A true copy.

Test: EDWARD W. WADSWORTH,

Clerk, U. S. Court of Appeals, Fifth Circuit, New Orleans, Louisiana.

June 30, 1961.

APPENDIX B

JUDGMENT

No. 18447

Extract from the Minutes of May 17, 1961

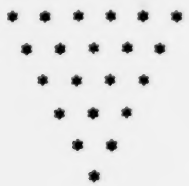
SAMUEL KOWALSKY,

versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.



APPENDIX C

FILED

(354)

22nd day of June, 1961

CLARA R. JAMES,
Clerk of the United States Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18447

SAMUEL KOWALSKY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appealed from the United States District Court for the Southern District of Texas

(June 22, 1961)

On Petition for Rehearing

Before TUTTLE, Chief Judge, and HUTCHESON and JONES, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and it is hereby DENIED.

APPENDIX D

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

VENUE

Fifth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . ."

26 U.S.C., §7201, Internal Revenue Code of 1954

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

18 U.S.C., Rule 18, F.R.Cr.P.

"Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed, but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed."

"(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

"Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

"(b) Notwithstanding subsection (a), where an offense involves use of the mails and is an offense described in section 7201 or 7206 (1), (2), or (5) of the Internal Revenue Code of 1954 (whether or not the offense is also described in another provision of law), and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: *Provided*, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information."

FAIR TRIAL

Fifth Amendment

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

Cash, Accrual or Some Other Method of Reporting Income

26 U.S.C., §7201, Internal Revenue Code of 1954

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the cost of prosecution."

26 U.S.C., §446 (a), Internal Revenue Code of 1954

". . . Taxable income shall be computed under the method of accounting on the basis of which the taxpayer regularly computes his income in keeping his books."

26 U.S.C., §451 (a), Internal Revenue Code of 1954

". . . The amount of any item of gross income shall be included in the gross income for the tax-

able year in which received by the taxpayer, unless, under the method of accounting used in computing taxable income, such amount is to be properly accounted for as of a different period."